

Exhibit 13

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1 Pursuant to Fed. R. Civ. P. 37 (a) and Local Rule 37-2.1, Plaintiff Sony
2 Corporation (“Sony”) and Defendant Vizio, Inc. (“Vizio”) submit the following
3 joint stipulation in connection with Sony Corporation’s Motion to Compel a Further
4 Response to Sony’s Interrogatory No. 3.¹ The parties have complied with Local
5 Rule 37-1.²

6 **I. INTRODUCTION**

7 **A. Sony’s Introductory Statement**

8 Having failed to convince the Court to adopt its proposed schedule for this
9 litigation at the Court’s April 6, 2009 Scheduling Conference, Vizio now seeks to
10 unilaterally impose its own schedule by refusing to respond to Sony’s interrogatory
11 request seeking Vizio’s non-infringement claim charts. The Discovery Rules do not
12 allow such a strategy. Rather, the Federal Rules are clear that “the purpose of
13 discovery is to remove surprise from trial preparation so the parties can obtain
14 evidence necessary to evaluate and resolve their disputes. *National Academy of*
15 *Recording Arts & Sciences, Inc. v. On Point Events, LP*, --- F.R.D. ---, 2009 WL
16 1068962 at * 2 (C.D. Cal. February 25, 2009). Furthermore, “[t]he party who resists
17 discovery has the burden to show discovery should not be allowed.” *Id.* Vizio has
18 not met this burden. Vizio has merely asserted a mistaken belief that the law per se
19 disfavors early contention interrogatories and therefore it should not have to respond
20 to Sony’s interrogatory requesting non-infringement claim charts for seven more

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22 ¹ Vizio’s Response to Sony’s First Set of Interrogatories (Nos. 1-18) is attached to the
23 accompanying Declaration of Peter A. Klivans in Support of Joint Stipulation Regarding Sony
24 Corporation’s Motion to Compel a Further Response to Sony Interrogatory No. 3 (“Klivans
25 Decl.”) at Ex. D. Pursuant to Local Rule 37-2.1, a copy of this Court’s order establishing the
initial case schedule is attached as Ex. B to the Klivans Declaration.

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² Pursuant to Local Rule 37-1, the parties have conducted a pre-filing conference of counsel
by letter (April 29, 2009, May 6, 2009, and May 7, 2009) (Klivans Decl. Exs. E, F, and G) and
have met and conferred in-person (May 11, 2009), which was transcribed by a court reporter.
(Klivans Decl. Ex. A.)

1 months, until 21 days before the pretrial conference. Should Vizio succeed in
2 delaying its response, Sony will be prejudiced by Vizio's refusal to provide its non-
3 infringement claim charts on a timely basis. Vizio should not be allowed to
4 continue to refuse to provide a substantive response.

5 On March 23, 2009, Sony served Vizio with its First Set of Interrogatories,
6 including Interrogatory No. 3, which requested Vizio's non-infringement claim
7 charts. In its initial response to this interrogatory on April 22, 2009, Vizio merely
8 objected and stated that it would supplement its response within a "reasonable
9 period of time" after Sony provided a list of asserted claims and accused products.
10 Sony provided a list of asserted claims by letter on April 29, 2009 and provided a
11 list of accused products on April 30, 2009 in its own responses to Vizio's
12 interrogatories, which also included detailed infringement claim charts. Despite
13 having provided the information requested by Vizio, on May 6, 2009, Vizio stated
14 by letter that it would in fact not be supplementing its response to Sony's
15 Interrogatory No. 3 until after the November 1, 2009 close of discovery, when it
16 provides its "expert narrative statements twenty-one days before the pre-trial
17 conference." (Klivans Decl. Ex. F at 4.) Vizio confirmed its position in the parties'
18 May 11, 2009 meet and confer. (Klivans Decl. Ex. A at 20:9-20.)

19 Vizio's refusal to respond to Sony's Interrogatory No. 3 will result in unfair
20 surprise and prejudice to Sony. Without Vizio's non-infringement claim charts,
21 Sony will be unable to carry out discovery, including written discovery, deposition
22 testimony, or expert discovery, on Vizio's non-infringement contentions prior to the
23 November 1, 2009 close of discovery. For Vizio to contend that Sony can engage in
24 discovery and prepare its case without knowledge of Vizio's non-infringement
25 contentions until twenty-one days before the pre-trial conference is extremely
26 prejudicial to Sony.

27 Given Vizio's unwillingness to provide a substantive answer to Interrogatory
28 No. 3, Sony is forced to bring this dispute to the Court for resolution. Sony

1 respectfully requests that the Court order Vizio to comply with its discovery
2 obligations and supplement its response to Interrogatory No. 3.

3

4 **B. Vizio's Introductory Statement**

5 [TBA]

6

7 **II. DISPUTED INTERROGATORY NO. 3**

8 On March 23, 2009, Sony propounded its First Set of Interrogatories to Vizio
9 (Nos. 1-18). (Klivans Decl. Ex. C.) Vizio served objections and responses to
10 Sony's interrogatories on April 22, 2009. (Klivans Decl. Ex. D.) Sony's
11 Interrogatory No. 3, along with Vizio's response, is set forth as follows.

12 **INTERROGATORY NO. 3:**

13 Set forth in claim chart form the bases for Vizio's First Affirmative Defense
14 that "it does not infringe, induce infringement of, or contributorily infringe any
15 properly construed, valid claim of ... the 'patents-in-suit.'" (ellipsis in original)

16 **RESPONSE TO INTERROGATORY NO. 3:**

17 In addition to and without limiting the foregoing General Objections, Vizio
18 objects to this Interrogatory as premature, overly broad and unduly burdensome in
19 that Sony has not yet identified the claims of the patents-in-suit that it is asserting
20 against Vizio and the products that are purportedly infringed by those claims. This
21 Interrogatory improperly seeks Vizio's non-infringement contentions with
22 respect to every claim of all ten asserted patents and with respect to every product
23 ever sold by Vizio. Vizio objects to responding with respect to any patent claims not
24 actually asserted by Sony and with respect to products not accused by Sony. Vizio
25 further objects to this Interrogatory as premature to the extent that it calls for the
26 disclosure of expert opinion or claim constructions in contravention of any
27 Scheduling Order to be entered by the Court. Vizio further objects to this
28 Interrogatory to the extent it seeks information protected by the attorney-client

1 privilege and/or work product immunity, or non-testifying expert privilege. Vizio
2 further objects to this Interrogatory on the ground that it is compound and
3 counts as multiple interrogatories rather than simply one interrogatory.

4 Subject to and without waiving the foregoing General and Specific
5 Objections, Vizio responds that upon receiving the identity of the asserted claims
6 and the products accused of infringing each of those claims, Vizio will
7 supplement its response to this Interrogatory within a reasonable period of time.

8 **A. Sony's Position Regarding Interrogatory No. 3**

9 Interrogatory No. 3 is a straightforward request that asks Vizio to provide
10 claim charts setting forth its non-infringement positions. This information is
11 obviously relevant to this patent infringement action and is well within the scope of
12 discovery permitted by the Federal Rules of Civil Procedure. Indeed, such
13 information is routinely exchanged in patent cases. Vizio's refusal to provide a
14 timely response to Interrogatory No. 3 is unreasonable, violates the Federal Rules,
15 and obstructs Sony's ability to prepare its case for trial. It also will effectively
16 prevent the parties from crystallizing their disputes in a manner that will allow them
17 to be resolved by the Court.

18 **1. Sony's Interrogatory Is Relevant and Proper Under the**
19 **Federal Rules**

20 Vizio has no legitimate basis for refusing to disclose the information sought
21 by Interrogatory No. 3. Federal Rule of Civil Procedure 26 provides that a party
22 "may obtain discovery of any nonprivileged matter that is relevant to any party's
23 claim or defense[.]" Indeed, the liberal rules of discovery embodied in the Federal
24 Rules of Civil Procedure permit any discovery that is "reasonably calculated to lead
25 to the discovery of admissible evidence." *Id.* An interrogatory regarding the bases
26 for an affirmative defense of non-infringement clearly meets this standard. Vizio
27 does not dispute that it must provide the information sought. Rather, it asserts that it
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1 has no obligation to respond to Sony's Interrogatory until after the close of
2 discovery, when the parties exchange expert reports.

2. Vizio Should Respond to Sony's Interrogatory No. 3 With The Information It Now Has

5 As described above, on March 23, 2009, Sony served Vizio with its First Set
6 of Interrogatories, including the subject of this joint stipulation, Interrogatory No. 3.
7 That interrogatory requested that Vizio “Set forth in claim chart form the bases for
8 Vizio’s First Affirmative Defense that ‘it does not infringe, induce infringement of,
9 or contributorily infringe any properly construed, valid claim of … the ‘patents-in-
10 suit.’” (ellipsis in original). On April 22, 2009, Vizio responded to Interrogatory
11 No. 3, stating, “upon receiving the identify of the asserted claims and the products
12 accused of infringing each of those claims, Vizio will supplement its response to this
13 Interrogatory within a reasonable period of time.”

14 On April 29, 2009, Sony sent a letter to Vizio setting forth exactly which
15 claims it is presently asserting against specific Vizio products. (Klivans Decl. Ex. E
16 at 3.) The next day, in response to Vizio’s interrogatories, Sony provided an
17 interrogatory response that incorporated this information and also include detailed
18 claim charts. Yet despite having all of the information that Vizio said it needed to
19 supplement its response, Vizio reversed course, stating in its May 6, 2009 letter that
20 it would not supplement its response to Sony’s Interrogatory No. 3 until after the
21 November 1, 2009 close of discovery, when it provides its “expert narrative
22 statements twenty-one days before the pre-trial conference.” (Klivans Decl. Ex. F at
23 4.) The pre-trial conference is set for January 10, 2010. During the parties’ May 11,
24 2009 meet and confer, Vizio confirmed its intention not to provide a substantive
25 response for Interrogatory No. 3 until 21 days before January 10, 2010. (Klivans
26 Decl. Ex. A at 20:12-15).

27 Although Vizio is unwilling to provide noninfringement contentions at the
28 present time, its First Set of Interrogatories, served March 31, 2009, asked Sony to

1 provide its infringement contentions. Indeed, Vizio's Interrogatory No. 1 requested
2 that Sony "using a claim chart format, indicate the element or component of such
3 Accused Vizio product that allegedly meets each limitation of each Asserted
4 Claim." As noted above, Sony responded to that interrogatory on April 30, 2009,
5 providing detailed infringement charts totaling over 1400 pages that set forth Sony's
6 present infringement contentions—in advance of any production of documents or
7 other discovery by Vizio—on an element-by-element basis for the accused
8 products.³ For each element, Sony's claim charts included page citations to Vizio
9 product manuals.

10 Vizio's refusal to respond to Sony's interrogatory requesting non-
11 infringement claim charts stands in stark contrast to Vizio's own service of an
12 interrogatory requiring Sony to provide detailed infringement claim charts.
13 Although Sony provided those charts on April 30, 2009 and plans to supplement
14 them as additional discovery becomes available, Vizio refuses to disclose any
15 noninfringement contentions until the eve of trial. This is improper. Discovery is
16 not a one-way street in which one party timely provides information while the other
17 delays responding for strategic gain. *U.S. v. Two Bank Accounts*, 2008 WL 2696927
18 at *3 (D.S.D. July 2, 2008) ("The process of discovery is a two-way street that is
19 designed to allow each party to the lawsuit to discover the facts and witnesses the
20 other party intends to present at the trial of the case.").

21 **3. Vizio's Delay Will Result in Unfair Surprise and Prejudice to**
22 **Sony**

23 "[T]he purpose of discovery is to remove surprise from trial preparation so
24 that parties can obtain evidence necessary to evaluate and resolve their dispute."

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26 ³ At this early stage of discovery, Sony based its infringement claim charts on publicly
27 available information. Sony provided claim charts for the accused products as a group. As the
28 (footnote continued)

1 *National Academy of Recording Arts & Sciences, Inc. v. On Point Events, LP, ---*
2 F.R.D. ---, 2009 WL 1068962 at * 2 (C.D. Cal. February 25, 2009). In keeping with
3 this purpose, the purpose of Sony's Interrogatory No. 3 is to allow the parties to set
4 forth their infringement and non-infringement contentions early in the discovery
5 process so that the parties will be able to seek relevant discovery of matters relating
6 to the parties' underlying contentions. "Requiring a defendant to answer a
7 contention interrogatory and to produce documents that support its affirmative
8 defenses is consistent with Rule 11 of the Federal Rules of Civil Procedure, which
9 require parties have some factual basis for their claims and allegations." *Id.* at *4.
10 Here, the patents-in-suit concern technologies relating to closed captioning and on-
11 screen menus, among other technologies. In order to adequately prepare for
12 depositions, to serve relevant Requests for Admission, to know what third party
13 discovery to engage in, and to carry out its obligations under the Federal Rules with
14 respect to expert discovery, Sony must know what aspects of these technologies on
15 the accused products are in dispute.

16 Despite the obvious relevance of the information sought by Interrogatory No.
17 3, Vizio has taken the position that it can withhold its non-infringement claim charts
18 for the next seven months. The Court has set a Discovery Cut-off of November 1,
19 2009, and yet Vizio has stated that it will not respond to this Interrogatory until 21
20 days before the January 10, 2010 pre-trial conference. Sony will have no
21 opportunity prior to the close of discovery to depose witnesses regarding Vizio's
22 non-infringement positions, nor any opportunity to seek third-party discovery of the
23 parts and components that Vizio refers to in its claim charts. This would result in
24 serious prejudice to Sony, that could possibly only be ameliorated by the preclusion
25 of Vizio's evidence at trial. *See, e.g., Heidelberg Harris, Inc. v. Mitsubishi Heavy*

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27 parties engage in substantive discovery, Sony will supplement its response to Vizio's Interrogatory
28 No. 1, pursuant to Fed. R. Civ. P. 26(e).

1 *Industries, Ltd.*, 1997 WL 321686 (N.D. Ill. June 6, 1997) (finding that “the
2 prejudice resulting from Mitsubishi’s failure to timely reveal the basis of its Section
3 112 defense warranted the preclusion of any evidence on this defense at trial”).
4 Rather than proceed down this route, Vizio should be required to provide
5 substantive non-infringement claim charts on a timely basis. For Vizio to contend
6 that Sony must engage in discovery and prepare its case without knowledge of
7 Vizio’s non-infringement contentions until twenty-one days before the pre-trial
8 conference is extremely prejudicial to Sony.

9 **4. Vizio Should Be Ordered to Immediately Respond to Sony’s
10 Interrogatory No. 3**

11 Vizio’s assertion that contention interrogatories are disfavored at the start of
12 discovery is incorrect. Although Fed. R. Civ. P. 33(a)(2) does state that “[a
13 contention] interrogatory need not be answered until designated discovery is
14 complete, or until a pretrial conference or some other time,” this limitation is aimed
15 at interrogatories which a party cannot reasonably respond to until later in the
16 discovery process. But the mere fact that forthcoming discovery will permit a more
17 complete answer to a contention interrogatory does not make the interrogatory
18 premature. Rather, a party responding to a contention interrogatory at an early stage
19 of discovery should “answer [the] interrogatory [] based on the information it has to
20 date.” *Cable & Computer Technology, Inc. v. Lockheed Sanders, Inc.*, 175 F.R.D.
21 646, 652 (C.D. Cal. 1997). Sony does not dispute Vizio’s right to timely
22 supplement any response it provides now to the extent it learns additional
23 information responsive to this interrogatory during the course of discovery. *Id.*
24 (“Of course, [the party] may later amend its answer … or supplement it, as it has an
25 obligation to do under Fed. R. Civ. P. 26(e).”); *see also Bathija v. Panoff Pub., Inc.*,
26 2005 WL 2323298 at *1 (D. Alaska Sept. 21, 2005); *Titre v. S.W. Bach & Co.*, 2005
27 WL 1692508 at * 1 (S.D. Fla. July 20, 2005) (“Defendant’s lone complaint about
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1 this Interrogatory is that it is premature; yet, Defendant is authorized to (and indeed,
2 must) supplement its discovery responses as information becomes available to it.”).
3 Indeed, Vizio is obligated to do so. Fed. R. Civ. P. 26(e).

4 Vizio should be ordered to provide its response now, at the outset of
5 discovery, because by exchanging infringement and non-infringement claim charts,
6 the parties may 1) clarify the issues in the case; 2) narrow the scope of their dispute;
7 and 3) potentially encourage early settlement discussion.

8 The parties’ mutual exchange of infringement and non-infringement claim
9 charts at an early stage of discovery will clarify the issues in the case and narrow the
10 scope of the dispute. By crystallizing which features and technologies of the
11 asserted products are in dispute as potentially infringing the asserted claims, the
12 parties will be able to focus their upcoming discovery, including additional written
13 discovery, depositions, and expert discovery, on the relevant features and
14 technologies. In general, courts routinely require defendants in patent infringement
15 matters to respond to contention interrogatories regarding their affirmative defenses
16 at the outset of discovery. *Cornell Research Foundation, Inc. v. Hewlett Packard*
17 Co., 223 F.R.D. 55, 67 (N.D.N.Y. 2003) ([F]undamental fairness dictates, at a
18 minimum, that HP be required to flesh out the contentions associated with this
19 affirmative defense in sufficient detail to allow CRF to conduct meaningful
20 discovery concerning it.); *Dot Com Entertainment Group, Inc. v. Cyberbingo Corp.*,
21 237 F.R.D. 43, 45 (W.D.N.Y. 2006) (“[C]ontention interrogatories seeking the bases
22 for Defendants’ prior art and obviousness defenses are enforced, even at an early
23 stage...”). Contention interrogatories seeking non-infringement claim charts are not
24 treated any differently. *Ring Indus. Group, LP v. E Z Set Tank Co., Inc.*, 2008 WL
25 2413996 at *6 (W.D.N.C. June 11, 2008).

26 Furthermore, clarification of the issues and narrowing of the dispute may
27 encourage the parties to seek settlement to the extent each side better understands
28

1 the other's infringement or non-infringement assertions. Delay will likely have the
2 opposite effect and reduce the chances of the parties' seeking settlement.

3 **5. It is Improper for Vizio to Condition its Response on Sony's**
4 **Responses to Vizio's Interrogatories**

5 In its May 6, 2009 letter to Sony, Vizio stated that it would not provide its
6 non-infringement claim charts until 21 days before the pre-trial conference.
7 However, referring to Sony's request for non-infringement claim charts as a request
8 for legal contentions, Vizio further stated: "Alternatively, if you would like to
9 discuss a mutually agreeable schedule by which legal contentions and expert
10 opinions are to be exchanged, Vizio would be happy to do that." (Klivans Decl. Ex.
11 F at 4.) Although Vizio may propose to Sony a schedule for expert opinion
12 exchanges different from that required by the Local Rules and the Court's April 6,
13 2009 Scheduling Order, Vizio may not withhold a discovery response in an effort to
14 force Sony to agree to Vizio's preferred schedule. "Discovery is not conducted on a
15 'tit-for-tat' basis." *National Academy of Recording Arts & Sciences*, 2009 WL
16 1068962 at *2.

17 Nor can Vizio properly withhold information it is obligated to provide based
18 on alleged deficiencies in *Sony's* discovery responses. The Federal Rules and
19 relevant case law are clear that a party is not permitted to condition its compliance
20 with discovery obligations upon its unilateral satisfaction with a response to other
21 discovery by the propounding party. Fed. R. Civ. P. 26(d)(2) ("Unless, on motion,
22 the court orders otherwise . . . discovery by one party does not require any other
23 party to delay its discovery."); *Zamora v. D'Arrigo Bros. Co. of Cal.*, 2006 WL
24 931728, at *5 (N.D. Cal. 2006) (Rule 26(d) "eliminate[s] any fixed priority in the
25 sequence of discovery") (internal quotation marks and citation omitted); *see also*
26 *Convolve, Inc. v. Compaq Comp. Corp.*, 2000 WL 1480363, at *1 (S.D.N.Y. Oct. 6,
27 2000) ("[W]ithout judicial intervention a party can neither assert priority in
28 discovery nor make its responses to another party's discovery requests contingent

1 upon reciprocal compliance.”). Therefore, it is improper for Vizio to suggest that it
2 would provide a response to Interrogatory No. 3 if only Sony would agree to a
3 revised schedule for expert discovery.

4 In view of the foregoing, Sony respectfully requests the Court grant Sony’s
5 motion to compel Vizio to provide a complete response to Sony’s discovery by
6 providing Sony with non-infringement claim charts as requested by Interrogatory
7 No. 3.

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9 **B. Vizio’s Position Regarding Interrogatory No. 3**

10 [TBA]

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1 **III. CONCLUSION**

2 **A. Sony's Conclusion**

3 For the foregoing reasons, the Court should compel Vizio to promptly
4 supplement its response to Sony's Interrogatory No. 3.

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6 **B. Vizio's Conclusion**

7 [TBA]

8

9 DATED: May , 2009

Respectfully submitted,

10 QUINN EMANUEL URQUHART OLIVER &
11 HEDGES, LLP

12 By

13 _____
14 Kevin P.B. Johnson
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16

17 DATED: May , 2009

Respectfully submitted,

18 _____
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20 By

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